UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

In Re Subpoena to Daniel McLean in Jacob R. Kent, *et al.*, v. R.L. Vallee, Inc. *et al.*, Case No. 617-6-15 Cncv	Case No. 2:18-cv-201-wks **Oral Argument Requested**

R.L. VALLEE, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO DANIEL McLEAN'S MOTION TO QUASH

NOW COMES R.L. Vallee, Inc. ("R.L. Vallee"), by and through its attorneys, Downs Rachlin Martin PLLC, and hereby submits this Memorandum of Law in Opposition to Daniel McLean's Motion to Quash (hereafter "Motion" or "Mot."). ECF 7. Mr. McLean is employed in the Office of Untied States Senator Bernard Sanders as a senior press advisor. On November 9, 2018, R.L. Vallee served a subpoena upon Mr. McLean in connection with a pending state court action styled *Kent, et al. v. R.L. Vallee, et al.* (the "Civil Action"),[1] seeking discovery regarding his role in coordinating with a for-profit, Washington, D.C.-based class action law firm to bring the Civil Action against R.L. Vallee; Champlain Oil Co., Inc.; S.B. Collins, Inc.; and Wesco, Inc. (collectively, "Defendants"). Because Mr. McLean's extracurricular communications and coordination with a private law firm (including through the use of his private email account) to bring a private lawsuit against the Senator's constituents[2] are not part of his (or the Senator's) legitimate legislative activities, Mr. McLean is not immune from answering discovery either by the Speech or Debate Clause or by any other species of immunity he asserts in the Motion. As set forth more fully below, his Motion should be denied.

[1] No. 617-6-15 Cncv (Toor, J.).

[2] Defendants are all incorporated in Vermont.

FACTUAL AND PROCEDURAL BACKGROUND

To provide a factual context for the subpoena and for this Opposition, R.L. Vallee submits the following proffer, which is supported by the Declaration of Tristram J. Coffin and Exhibits ("Coffin Declaration"), filed concurrently herewith.[3]

Summer 2012: Correspondence Between Senator Sanders and the Federal Trade Commission ("FTC") Regarding Gasoline Prices in Vermont Results in No Enforcement Action by the FTC, Which Found That Gasoline Prices in Burlington Overwhelmingly Fell Within Predicted Levels Between January 2010 and June 2012

At some point in 2012, Senator Sanders began to repeatedly and publicly criticize Vermont fuel dealers for purportedly charging excessive prices for gasoline throughout Vermont, but particularly in the northwestern Vermont area in and around Burlington. On July 2, 2012, Senator Sanders wrote to the FTC, the primary federal agency with law enforcement jurisdiction over antitrust, unfair competition, and price-fixing statutes in the gasoline industry. In his letter, Senator Sanders wrote to "urge the Oil and Gas Fraud Working Group and the Federal Trade Commission to conduct an investigation" into allegedly high gas prices in the Burlington, Vermont area (Chittenden, Grand Isle and Franklin Counties). *See* Exhibit B.

On July 6, 2012, FTC Chairman Jon D. Leibowitz responded to Senator Sanders and explained that based on the FTC's ten-years-running Gasoline Diesel and Price Monitoring Project, daily retail prices for gasoline in the Burlington area were within the range predicted by the FTC's model for the entire period between January 2010 to June 2012, except that they exceeded predicted levels for the last four weeks of the period. *See* Exhibit C. Chairman Leibowitz assured the Senator that "[t]he FTC is constantly on alert to ensure that consumers in Vermont and throughout the United States are not subject to any conduct in the petroleum

[3] All references herein to "Exhibit" or "Ex." refer to the exhibits to the Coffin Declaration. The subpoena to Mr. McLean is Exhibit A.

industry that violates the laws and rules that we enforce." *Id.* at 1. He further assured Senator Sanders that:

> [t]he Commission shares your deep concern over the economic hardship consumers face when gasoline and other energy prices are high. . . . Accordingly, the FTC does not hesitate to proceed against conduct that it has reason to believe is illegal. While FTC staff is hopeful that Burlington retail gasoline prices will soon be back in their predicted range, I can assure you that we exercise our statutory authorities to the fullest extent possible ***when we have indications of unlawful conduct***.

Id. at 2 (emphasis supplied).

Chairman Leibowitz enclosed a graph that showed prices for gasoline in the Burlington area from January 2010 through June 2012. The graph depicted Burlington area gas prices within the range expected by the FTC's Gasoline Project model for the entire period except a short period at the far right end axis of the graph. *See id.* at 3 (graph depicting actual gasoline prices falling in between the FTC model's predicted high and predicted low prices, except during brief period in June 2012).

Even though the law enforcement agency with expertise and authority to enforce antitrust laws explicitly informed Senator Sanders' office that gas prices had been almost entirely within the FTC's predicted margins, Senator Sanders' office nevertheless issued a press release with the headline, "Burlington Gas Prices Exceed FTC Projections." The press release declared that "[g]asoline prices in Burlington in June were as much as a dime to 43 cents greater than a Federal Trade Commission computer model projected they should be, according to commission data turned over to U.S. Sen. Bernie Sanders (I-Vt.)." Exhibit D.

Senator Sanders' press release failed to include or mention the graph attached to Chairman Leibowitz's letter which reflected that gasoline prices in the Burlington area had been within expected ranges between January 2010 and June 2012 and that they only exceeded the

predicted high range of the FTC's model during the last period of June. This press release misrepresented the FTC's findings, namely, that gas prices were within expected bounds for almost the entire time analyzed by the FTC. Indeed, the response of career FTC officials to Senator Sanders' misuse of their data is captured in a July 6, 2012 email among FTC staff who had studied the issue, circulating a link to a *Burlington Free Press* article regarding Senator Sanders' press release: "For those wondering how Sanders would use the chart and data we provided, I give you [link to *Burlington Free Press* article.]" *See* Exhibits E & F. This misrepresentation cast Vermont fuel dealers, and R.L. Vallee in particular, in a negative false light, resulting in significant harm and damage to the company and its principals.

It was particularly surprising that Senator Sanders and his office failed to accurately summarize the FTC findings that the January 2010 to June 2012 gas market in the Burlington area was almost entirely within the ranges the FTC gas pricing model would predict. That is because a similar request by Vermont's congressional delegation in 2008 to the FTC had revealed essentially the same findings with regard to the Burlington gas market, namely, that the gas prices were almost entirely within the range anticipated in the FTC's expert model analyzing gas prices nationally. Chairman Leibowitz wrote in July 2009 that the FTC had initiated an investigation, coordinated with the Vermont and New York Attorney General's Offices, which "did not uncover any illegal activity" and further noted that "[n]or did market data support the notion that there was a conspiracy to raise prices last fall" and that there was no indication of anticompetitive activity with regard to wholesale prices either. *See* Exhibit G (Apr. 30, 2008 letter from Vermont's congressional delegation) & Exhibit H at 4 (July 9, 2009 response from Chairman Leibowitz). Chairman Leibowitz enclosed a similar graph showing expected high and

low gasoline prices for the January 2008-June 2009 period. The graph showed that, except for a period in the fall of 2008, the prices were within expected ranges.

According to further communications among FTC personnel, Chairman Leibowitz spoke to Senator Sanders on or about July 28, 2012 and made clear that the FTC would not investigate further, but would assist the Vermont Attorney General if he chose to investigate. *See* Exhibit I; Exhibit J (Jan. 7, 2013 VPR story stating that the FTC "has told Sanders no further investigation is planned"). Regardless, Senator Sanders continued to highlight the issue, going on to convene a hearing in Burlington on August 6, 2012, under the auspices of the U.S. Senate Committee on Energy and Natural Resources, repeating some of the same allegations and omissions made in his earlier press release. *See* Exhibit K.

In January 2013, after the FTC had made clear it would not investigate the matter further, the Vermont Legislature held hearings to study gasoline prices. During those hearings, Vermont Attorney General William Sorrell indicated that his Office had not identified evidence of wrongdoing, either. *See* Exhibit L (quoting General Sorrell as stating "[w]e have no evidence right now of outright violations of antitrust laws"). To this day, no evidence has arisen to prompt the FTC to bring a gasoline pricing enforcement action in Vermont.

Fall 2014: Mr. McLean and/or Senator Sanders Suggest That a Case Be Brought by the Vermont Attorney General's Office "Just to Make a Point," But No Enforcement Action Is Brought

While the FTC notably declined to take any enforcement action against Defendants from 2009 to 2013, in late 2014, the issue received renewed attention within Senator Sanders' office. On September 17, 2014, Mr. McLean emailed Ryan Kriger of the Vermont Attorney General

Office's Public Protection Division[4] offering "some ideas on how you can get some pricing data that the AG said he was looking for." *See* Exhibit M (Sept. 17, 2014 email at 1:17 p.m.). That same day, a story ran in a local newspaper, *Seven Days*, about a political advocacy opinion piece funded by Rodolphe "Skip" Vallee which criticized Senator Sanders' wife for a "golden parachute" she had received after departing as Burlington College's president in 2011. *Seven Days* reported that the piece had been distributed to media outlets on the morning of September 17. *See* Exhibit N. Mr. McLean's September 17, 2014 email was the first contact from Mr. McLean that Assistant Attorney General ("AAG") Kriger could recall having since 2012. Ex. O at 59:17-20.

Mr. McLean's overture to AAG Kriger led to a meeting one week later with Senator Sanders at the Senator's Burlington office on September 25, 2014. The meeting was attended by four individuals: Senator Sanders, Mr. McLean, AAG Kriger, and then-Chief of the Public Protection Division, AAG Wendy Morgan.[5]

AAG Kriger was deposed in the Civil Action on November 29, 2018 as the designee of the Attorney General's Office pursuant to Vt. R. Civ. P. 30(b)(6). He testified that he kept handwritten notes of the September 25, 2014 meeting and authenticated his notes, which were produced by the Attorney General's Office in response to a previously asserted public records request on the morning of the deposition. Ex. Q; Ex. O at 61:4-6. As reflected in AAG Kriger's

[4] The Vermont Attorney General's Office's Public Protection Division is responsible for enforcing the State's antitrust and consumer protection laws. AAG Kriger is among the primary assistant attorneys general responsible for antitrust enforcement.

[5] At about this same time, the Vermont Legislature began considering legislation to impose price monitoring, merger, and other significant regulations on Vermont gas sellers. One of Senator Sanders' former campaign staffers, then-Representative Christopher Pearson, was the chief sponsor of this legislation. On January 22, 2015, Mr. McLean testified at a hearing before the Vermont Legislature on the proposed legislation. *See* Exhibit P (enclosing materials to present to Legislature, which did not include the FTC's 2009 or 2012 analyses about prices being within the ranges expected by the FTC model and finding no illegal activity). AAG Kriger also testified at the January 2015 hearing. The proposed legislation did not pass.

notes, R.L. Vallee was the only Defendant in the Civil Action noted to have been discussed by name at that meeting. Ex. O at 70:3-16. AAG Kriger's notes also refer to "Costco," "Walmart," "Plainfield," and "covenants," which each appear to be shorthand references to four gasoline-related issues that uniquely involve R.L. Vallee. *Id.* at 62:10-66:4.

Most significantly, the following notation appears in AAG Kriger's notes beneath the reference to "Vallee:"

"Bring case just to make a point"

Ex. Q; Ex O at 71:7-9 (identifying handwritten notation). AAG Kriger testified that neither he nor AAG Morgan had said that a case could or should be brought by the Attorney General's Office "just to make a point." *Id.* at 71:10-24. Because Senator Sanders and Mr. McLean were the only other attendees at this meeting, one (or both) of them had been the one(s) to say that the Attorney General's Office bring a case—against R.L. Vallee and perhaps others—"just to make a point." *Id.* at 71:25-72:2. AAG Kriger emphasized that he never gave serious thought to this suggestion, which he considered to be unusual, and he readily agreed in his deposition that "just mak[ing] a point" is not a permissible purpose for a public law enforcement officer to bring a case, because public cases must be based on evidence of wrongdoing and because public officers are charged with the obligation to pursue justice. *Id.* at 73:17-74:18; *see also id.* at 107:5-21; 107:24-108:2 ("We protect the public, and often the respondent is a member of the public that we are here to protect."). In the weeks following the September 25, 2014 meeting, Mr. McLean repeatedly emailed AAG Kriger to ask whether the Vermont Attorney General would take action. *See* Exhibit R (Oct. 6, Oct. 20, Oct. 22 emails).[6]

[6] On September 15, 2014, then-Attorney General William Sorrell held a public press conference with then-candidate for Lieutenant Governor Dean Corren, an ally of Senator Sanders, regarding gasoline prices. An email sent by General Sorrell, which was published in *Seven Days* on January 28, 2016, revealed that General Sorrell made the campaign appearance with Mr. Corren because he "care[d] about the issue, not to mention the $4k

Like the FTC, the Vermont Attorney General's Office, to this day, has never brought an enforcement action against R.L. Vallee or any other Defendant regarding the subject matter of the Civil Action.

Fall 2014-Spring 2015: Following Mr. McLean's Communications and Coordination with Plaintiffs' Counsel, the Civil Action Is Filed in Chittenden Superior Court

Notwithstanding the decisions of the FTC and Vermont Attorney General, the lead public antitrust enforcement agencies, to forego enforcement actions against the Defendants, and the decision of the Vermont Legislature not to pass legislation, the issue of gas prices in the Burlington area attracted the attention of the for-profit, class action bar. On November 26, 2014, soon after the meeting with the Vermont Attorney General's Office in Senator Sanders' office, Joshua L. Simonds, Esq. wrote to Senator Sanders stating he was "in the process of investigating and researching remedies which may be available to Chittenden County motorists" and offering "to lend [his] own advocacy" to the issue. *See* Exhibit T. Throughout December 2014 and January 2015, Attorney Simonds corresponded on several occasions with Mr. McLean by email and telephone:

> Joshua: Nice to speak with you earlier today. Can you find some time on either Wed., Jan. 7 or Thurs., Jan. 8 to come to our office to meet about the Vermont gas pricing issue. I will pull together some material for you.

Exhibit U (Dec. 19, 2014).

> Josh: Can you give me a quick call. I have something that may interest you re: Vermont gas prices. Dan.

Id. (Dec. 22, 2014).

> Josh: When would you be free this week to meet briefly about gas prices. I am happy to share with you the data that we have. Happy New Year. … Dan.

[contribution] a whole seller gave a prior opponent." *See* Exhibit S (publishing email by General Sorrell). This statement is a reference to 2012 campaign contributions made by Mr. and Mrs. Vallee to General Sorrell's primary opponent, current Attorney General Thomas J. Donovan.

Id. (Jan. 6, 2015) (ellipses in original).

Within a few months, Mr. McLean began corresponding regularly with attorneys from the national class action firm which ultimately brought this case, Bailey & Glasser. He did so through the use of his personal "gmail.com" email account rather than his "senate.gov" account. *See* Exhibit V (Feb. 27, 2015, Mar. 10, 2015, and Apr. 4, 2015 emails to Bailey & Glasser). On April 6, 2015, in response to an inquiry by Bailey & Glasser about what the FTC had found when they looked at the issue, Mr. McLean forwarded Senator Sanders' July 2012 press release regarding the FTC's analysis of gas prices in Burlington. *See* Exhibit W ("Here is the release that was issued in the summer of 2012 regarding the FTC's analysis of gas pricing in Burlington metro area"). This press release included an inset table of prices that was not included in the material provided by the FTC to Senator Sanders with FTC Chairman Leibowitz's July 6, 2012 letter. In providing information to Bailey & Glasser about the FTC's assessment of the issue, Mr. McLean did not forward Chairman Leibowitz's 2009 or 2012 letters, nor any of the FTC's graphical analyses of the issue, which indicated that gasoline prices in the Burlington area almost entirely fell within predicted levels from 2008 to 2012 and that the FTC had not identified any misconduct or wrongdoing.

On June 22, 2015, a putative class of gasoline purchasers in Chittenden, Franklin, and Grand Isle Counties filed suit in Chittenden Superior Court against the Defendants, alleging a wide-ranging conspiracy to fix gasoline prices.[7] Plaintiffs are represented by Joshua L. Simonds, Esq. and Bailey & Glasser—the same Vermont- and Washington-D.C.-based lawyers with whom Mr. McLean had coordinated throughout 2014-15 and to whom Mr. McLean had apparently

[7] That day, Representative Christopher Pearson emailed several state officials, including AAG Kriger, to apprise them that the Civil Action had been filed and published several tweets regarding the lawsuit. *See* Exhibit X.

furnished inaccurate and incomplete information regarding the FTC's analysis of gasoline prices in Vermont.[8]

Defendants have vigorously denied these unsupported and meritless allegations, and have defended the Civil Action for three-and-a-half years. On October 29, 2018, the Honorable Helen Toor ordered that discovery would close on December 3, 2018. After that discovery schedule was entered, the undersigned contacted Attorney Vinik of the Office of the Senate Legal Counsel to inquire as to whether a subpoena needed to be served upon Mr. McLean to secure his appearance for a deposition.[9] The result of those negotiations was that Mr. McLean would not appear voluntarily for his deposition but that Attorney Vinik would accept service of the subpoena, remove the matter to this Court, and file a motion to quash.

On November 9, 2018, R.L. Vallee served the subpoena upon Mr. McLean, seeking documents and testimony, with a return date and deposition date of December 3, 2018. The return date coincided with the close of discovery in the Civil Action because the parties had significant discovery, including numerous party-related depositions, to complete prior to that date. R.L. Vallee is prepared to take Mr. McLean's deposition and has expressed its willingness to narrow substantially its request for the production of documents.[10]

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[8] The Complaint tracks information provided by Mr. McLean.

[9] As referenced in the Motion, after a co-Defendant served a subpoena on Mr. McLean seeking documents that Mr. McLean had voluntarily produced to Plaintiffs' counsel, Attorney Vinik corresponded with the co-Defendant's counsel. That correspondence disclosed that Mr. McLean had provided documents to Plaintiffs' counsel that were not produced by Plaintiffs to Defendants. It did not, however, assert or establish that the issue of discovery from Mr. McLean had been resolved. Thus, both Mr. McLean and the Office of the Senate Legal Counsel had ample notice that discovery would be sought from Mr. McLean in the Civil Action.

[10] Undersigned counsel continue to meet and confer with Attorney Vinik and have offered to significantly narrow R.L. Vallee's document requests.

On November 28, 2018, Mr. McLean, represented by the Office of Senate Legal Counsel, removed the subpoena to this Court (ECF 1) and subsequently filed the instant Motion, seeking to quash the subpoena.

ARGUMENT

I. MR. McLEAN'S DEPOSITION IS NOT BARRED BY SOVEREIGN IMMUNITY

Mr. McLean first argues that sovereign immunity renders the subpoena unenforceable. Mot. at 6-12. The Court should reject this argument for two alternative reasons. As an initial matter, R.L. Vallee does not concede that a congressional staff member is protected from providing discovery by the sort of far-reaching sovereign immunity Mr. McLean asserts. Contrary to Mr. McLean's arguments, the legislative immunity for Members of Congress and their staff to withhold discovery resides solely in the Speech or Debate Clause. To the extent recent unpublished decisions from district courts outside of this Circuit hold to the contrary, these cases are not persuasive and their reasoning should be rejected. In the alternative, because the subjects of inquiry pertain to Mr. McLean's conduct which fell outside the scope of his official duties, R.L. Vallee does not seek to depose Mr. McLean in his official capacity. Thus, sovereign immunity cannot bar discovery regarding these matters.

A. The Speech or Debate Clause Is the Exclusive Fount of Immunity for Members of Congress and Their Staff

The Constitution expressly sets forth the legislative immunity enjoyed by Members of Congress in the Speech or Debate Clause. *See infra* § II. Despite this clear, textual reservation of legislative immunity, Mr. McLean not only asserts immunity under the Speech or Debate Clause, but also under a broader form of sovereign immunity. However, he cites no case in which the Supreme Court or the Second Circuit has so much as suggested (let alone held) that a

congressional employee is privileged from answering third-party discovery based upon sovereign immunity, and R.L. Vallee is aware of no such case.

Nearly all of the cases Mr. McLean cites are distinguishable. The majority of these cases involved subpoenas served upon a federal Executive agency, not upon a Member of Congress or congressional staff.[11] The enforceability of subpoenas served upon agency employees in private litigation is assessed under a well-recognized body of law and regulations stemming from the Administrative Procedure Act, 5 U.S.C. §§ 701-708, and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). *See, e.g.*, *Vermont v. Patten*, 2010 WL 11610366, at *2 (D. Vt. Feb. 4, 2010) (Sessions, J.) (quashing subpoena to ICE agents due to the party's failure to comply with applicable *Touhy* regulations). This body of law does not apply to congressional employees. *See* 5 U.S.C. § 701(b)(1)(A) ("'agency' means each authority of the Government of the United States . . . but does not include . . . the Congress").[12]

Almost all of the other cases Mr. McLean cites arose out of actions for damages against Congress,[13] not motions to quash a subpoena.[14] Mr. McLean cites just two cases in which a

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[11] *See, e.g.*, *In re SEC ex rel. Glotzer*, 374 F.3d 184 (2d Cir. 2004) (subpoena to lawyers for the Securities and Exchange Commission); *EPA v. Gen. Elec. Co*., 197 F.3d 592 (2d. Cir. 1999) (subpoena to Environmental Protection Agency); *Boron Oil Co. v. Downie*, 873 F.2d 67 (4th Cir. 1989) (same); *COMSAT Corp. v. Nat. Sci. Found.*, 190 F.3d 269 (4th Cir. 1999) (subpoena to National Science Foundation); *Houston Bus. Journal, Inc. v. Office of the Comptroller of the Currency*, 86 F.3d 1208 (D.C. Cir. 1996) (subpoena to OCC); *State of La. v. Sparks*, 978 F.2d 226 (5th Cir. 1992) (subpoena to federal probation officer).

[12] Mr. McLean argues that R.L. Vallee must comply with Rule XI.1 of the Standing Rules of the Senate and obtain a Senate resolution to secure his testimony. Mot. at 4 & n.2. However, that Rule, by its own terms, refers to "memorial or other paper presented to the Senate," not to testimony by a staffer. *Id.* n.2. Mr. McLean also cites no case in which a court has held that a party seeking discovery from a congressional staffer must comply with the Standing Rules of the Senate. This process is not a meaningful option. In contrast to federal agencies, whose *Touhy* determinations are subject to judicial review under Section 702 of the APA, it is unclear how a court could order the United States Senate to consider, let alone pass, a resolution authorizing discovery.

[13] *See, e.g.*, *Library of Congress v. Shaw*, 478 U.S. 310 (1986) (holding that sovereign immunity precluded recovery of interest in a Title VII suit against the Library of Congress); *Danihel v. Office of President of the United States*, 616 F. App'x 467 (3d Cir. 2015) (stating in note 2 that sovereign immunity precluded *pro se* plaintiff from recovering millions in damages against a host of state and federal officials in their official capacities); *Rockefeller v. Bingaman*, 234 F. App'x 852 (10th Cir. 2007) (similar action against Congress, Senator Bingaman, and Representative Pearce in their official capacities); *McLean v. United States*, 566 F.3d 391 (4th Cir. 2009) (similar

federal court has quashed a third-party subpoena to a Member of Congress. They are *Cartwright v. Walsh*, 2018 WL 461236 (M.D. Pa. Jan. 18, 2018) and *Khaja v. Husna*, No. 5:13-cv-25 (E.D.N.C. Apr. 9, 2013).[15] Mot. at 7 n.3. These cases are of limited persuasive value.

In *Cartwright*, the *pro se* respondent served subpoenas in connection with his closed divorce case upon U.S. Representative Cartwright and his District Director, neither of whom had any connection to the respondent's divorce proceeding. Under such circumstances, the district court did not need the benefit of full briefing to conclude that the subpoena should be quashed.[16] In *Khaja*, the subpoenaing party actually *conceded* that sovereign immunity would bar enforcement of the subpoena if its removal to federal court was proper. *See Khaja*, slip op. at 3 (ECF 7-2) (stating that Khaja "appears to concede that sovereign immunity would bar the relief he seeks if the subpoena proceeding were removable under § 1442, which, as discussed, it clearly is"). Thus, the scope of sovereign immunity was not disputed by the parties in *Khaja*.

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action against United States and Congress); *Liverman v. Committee on the Judiciary, U.S. House of Representatives*, 51 F. App'x 825 (10th Cir. 2002) (similar action against House Committee).

[14] *United States v. Maarawi*, 24 F. App'x 43 (2d Cir. 2001), a case which originated in this Court, Docket No. 2:00-cv-319-wks, is another decision in which sovereign immunity was one of several grounds to dismiss a *pro se* action against Congress. Unlike the instant matter, *Maarawi* was an action for damages against Congress itself and, in any event, has no precedential effect under the Second Circuit's Local Rules. *See* L.R. 32.1.1(a). As rehearsed in the Second Circuit's summary order, Mr. Maarawi had sued Congress for $1 billion for damages he allegedly sustained as a result of a congressional "war on welfare." *Id.* at 44. This Court granted the United States' motion to dismiss as unopposed, without adjudicating the government's assertion of sovereign immunity. *See* Exhibit Y. The Second Circuit affirmed, citing sovereign immunity and the Speech or Debate Clause. 24 F. App'x at 44.

[15] *SEC v. Committee on Ways and Means*, 161 F. Supp. 3d 199 (S.D.N.Y. 2015) involved the unusual situation where a subpoena had been served by the Securities Exchange Commission upon a congressional committee. Although the Court's opinion contains extensive discussion and canvassing of case law (cited in Mot. at 7 n.3), its discussion must be considered *dicta* because it ultimately "conclude[d] that sovereign immunity has no application here." *Id.* at 219.

[16] The respondent had further been subject to a filing injunction in the Middle District of Pennsylvania and was well known to the district court for filing "numerous frivolous and nonsensical actions over several years." *Cartwright v. Walsh*, 2018 WL 461236, at *1 (M.D. Pa. Jan. 18, 2018). In addition to subpoenaing Representative Cartwright, he also subpoenaed the President and other Heads of State. *Id.*

R.L. Vallee submits that any immunity enjoyed by Mr. McLean resides solely in the Speech or Debate Clause. Unlike the Executive and Judicial Branches, the Constitution speaks directly to legislative immunity for Members of Congress, which is not available to federal employees and officers outside of the Legislative Branch. Moreover, if it were truly the case that a broader sovereign immunity protects Members of Congress and their staffs, courts would rarely (if ever) have occasion to address claims under the Speech or Debate Clause.[17] Sovereign immunity should not be applied in a way that would render superfluous a specific constitutional provision, much less wipe away abundant case law analyzing this provision.

For similar reasons, the United States Court of Appeals for the District of Columbia Circuit declined to extend absolute official immunity to Members of Congress. *See Chastain v. Sundquist*, 833 F.2d 311 (D.C. Cir. 1987). In a lengthy decision by Judge Buckley, a former United States Senator from New York,[18] the D.C. Circuit stated that "members of Congress are not entitled to immunity for common law torts committed while acting within the scope of their official duties but outside the sphere protected by the Speech or Debate Clause." *Id.* at 312. In reviewing the Supreme Court's Speech or Debate Clause jurisprudence, the D.C. Circuit concluded that "to date the protection afforded by the Speech or Debate Clause has been seen as sufficient to protect the functional obligations of elected representatives" and "read the

[17] The Supreme Court, for example, could have avoided addressing the Speech or Debate Clause in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), analyzed *infra*, in which the Court held that Senator Proxmire's allegedly defamatory remarks (made outside the Senate Chamber) regarding purportedly wasteful federal spending were not protected by the Speech or Debate Clause. It is unlikely that Senator Proxmire would have neglected to assert sovereign immunity (or absolute official immunity) as a defense if it was available, since the substance of his remarks clearly related to his official duties as a U.S. Senator. Nor is it likely that the Supreme Court would have unnecessarily decided the constitutional issue if narrower grounds for disposition were available. *See Chastain v. Sundquist*, 833 F.2d 311, 317 (D.C. Cir. 1987). Likewise, in *United States v. Gravel*, analyzed *infra*, Senator Gravel did not assert (and the Supreme Court did not analyze) sovereign immunity as a defense to the federal grand jury subpoena investigating the private publication of the "Pentagon Papers." *Cf. SEC v. Committee on Ways and Means*, 161 F. Supp. 3d 199, 218 (S.D.N.Y. 2015) (stating "[t]here is no suggestion in *Gravel* that sovereign immunity barred enforcement of the grand jury subpoena").

[18] A dissenting opinion was registered by Judge Mikva, a former U.S. Representative from Illinois.

precedents to go further and state that members of Congress expressly cannot claim immunity from defamatory statements unprotected by the Speech or Debate Clause." *Id.* at 316. It further noted that the Supreme Court's Speech or Debate Clause jurisprudence would largely have been avoided if members of Congress enjoyed absolute immunity. *Id.* at 317 (stating that "[i]f members of Congress in fact enjoy absolute immunity, the Court should instead have avoided the Speech or Debate and First Amendment discussion" in *Proxmire*). Although *Sundquist* arose out of a tort action for damages, the D.C. Circuit's reasoning is logically applicable to the present issue seeking only discovery.

Thus, as a threshold matter, sovereign immunity is an inappropriate defense, because the Constitution specifically confers upon Mr. McLean the legislative immunity found in the Speech or Debate Clause—a significant, but not unlimited, immunity.

B. R.L. Vallee Seeks to Depose Mr. McLean Only About Matters Which Were Outside the Scope of His Duties for Which There Is No Basis for a Claim of Sovereign Immunity

Even if sovereign immunity could be asserted by a congressional employee to withhold discovery in private litigation, it is inapplicable here. The Supreme Court's sovereign immunity jurisprudence establishes that, "in the context of lawsuits against state and federal employees or entities, courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *Lewis v. Clarke*, 137 S. Ct. 1285, 1290 (2017) (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991)). "In making this assessment, courts may not simply rely on the characterization of the parties . . ., but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Id.*

At the same time, "[t]here may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. If the officer purports to act as an

individual and not as an official, a suit directed against that action is not a suit against the sovereign." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); *accord Boron Oil Co. v. Downie*, 873 F.2d 67, 69 (4th Cir. 1989) (stating that "an action seeking specific relief against a federal official, *acting within the scope of his delegated authority*, is an action against the United States" (emphasis supplied)). Thus, "[t]he identity of the real party in interest dictates what immunities may be available." *Clarke*, 137 S. Ct. at 1291. Courts have undertaken a similar analysis in determining whether a third-party subpoena may be enforced against employees of federal agencies. As the United States Court of Appeals for the District of Columbia Circuit has observed, "[n]o job is all work. . . . The government cannot credibly assert control over [personal] . . . observations and opinions unless they would reveal information in government records or about the workings of government." *In re Subpoena in Collins*, 524 F.3d 249, 252 (D.C. Cir. 2008) (reversing order quashing deposition subpoena to Smithsonian employee).

To the extent Mr. McLean can properly assert sovereign immunity, the Court may not simply "rely on the characterization of the parties" but should determine whether R.L. Vallee's subpoena actually implicates the concerns protected by sovereign immunity. *Cf. Clarke*, 137 S. Ct. at 1290. "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (internal citations omitted). These interests are not invaded by the subpoena to Mr. McLean seeking testimony.

Assessed against that standard, it strains credulity that Mr. McLean's official duties as a press aide for a United States Senator (or even the duties of the United States Senator himself)

included (among other activities): attempting to persuade the FTC or Vermont Attorney General's Office to bring a public enforcement action against Vermont companies; lobbying the Vermont Legislature to enact legislation against a constituent; or coordinating with Washington, D.C.-based counsel to develop a private, class-action litigation against Vermont constituents ("just to make a point"). That Mr. McLean may have engaged in some of this conduct while he was present in the workplace does not establish that he was properly "exercising the powers delegated to him by the sovereign." *Larson*, 337 U.S. at 693; *see also Collins*, 524 F.3d at 252 (respecting "the distinction between observations a federal employee makes in 'exercising the powers delegated to him by the sovereign,' and observations he makes merely because he is present in the workplace"). Moreover, Mr. McLean's communications with counsel were transmitted, in part, through his personal email account, not his "senate.gov" account. His decision to use personal email supports a reasonable inference that Mr. McLean himself may not have considered these communications to be work-related.

Because R.L. Vallee seeks to question Mr. McLean only about matters outside of his official duties, his deposition should proceed. Sovereign immunity can only foreclose R.L. Vallee, if at all, from obtaining specific relief from the *sovereign*. Mr. McLean's Motion conflates the well-settled distinction between a federal employee's official capacity and personal capacity. For this additional reason, sovereign immunity does not bar enforcement of the subpoena.

II. MR. McLEAN'S DEPOSITION IS NOT BARRED BY THE SPEECH OR DEBATE CLAUSE

A. Legal Standard

Mr. McLean next contends that his deposition is precluded by the Speech or Debate Clause of the United States Constitution. Mot. at 12-19. The Speech or Debate Clause provides, in pertinent part, that:

> The Senators and Representatives shall . . . in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

U.S. Const., art. I, § 6, cl. 1. The Supreme Court has explained that the Speech or Debate Clause "was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Gravel v. United States*, 408 U.S. 606, 616 (1972).

To secure for Congress its wide freedom of "speech, debate, and deliberation," the immunity conferred by the Speech or Debate Clause is not confined to "words spoken in debate" on the floor of the House of Representatives or Senate, but also applies with full force to "written reports presented in that body by its committees, to resolutions offered, . . . and to the act of voting, whether it is done vocally or by passing between the tellers." *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) (extending Clause "to things generally done *in a session* of the House by one of its members *in relation to the business before it*" (emphasis supplied)); *see also Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 505 (1975) (issuance of subpoenas pursuant to an authorized investigation is "an indispensable ingredient of lawmaking"); *Doe v. McMillan*, 412

U.S. 306, 313 (1973) ("authorizing an investigation," holding hearings, and preparing a report are protected by Speech or Debate Clause).[19]

Notwithstanding the foregoing, it is well established that the Speech or Debate Clause has "finite limits." *Id.* at 317. The Clause has "not been extended beyond the legislative sphere" and the mere fact that "Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Gravel*, 408 U.S. at 624-25. As the Supreme Court has explained:

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Id. at 625.

Indeed, the Supreme Court's cases "make perfectly apparent" that "everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause." *Doe*, 412 U.S. at 313. This is because the Clause was "not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States v. Brewster*, 408 U.S. 501, 507 (1972). While the Clause has its historic roots in English history and the struggle for parliamentary supremacy prior to the framing of the Constitution, the Clause "must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government[.]" *Id.* at 507-08 (citing *United States v. Johnson*, 383 U.S. 169, 178-79 (1966)). The Clause was "designed to preserve

[19] The Supreme Court has also held that the Speech or Debate Clause "applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." *Gravel v. United States*, 408 U.S. 606, 618 (1972).

legislative *independence*, not *supremacy*" and therefore must be applied "in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government." *Id.* at 508 (emphasis supplied).

Consistent with these principles, the Supreme Court has on numerous occasions reaffirmed that the scope of the Clause's immunities is limited to a Member's conduct within the sphere of "legitimate legislative activity." *Gravel*, 408 U.S. at 624. This sphere, in practice, is clearly circumscribed. For example, the Supreme Court held that the private publication of the "Pentagon Papers" by Senator Mike Gravel of Alaska in coordination with Beacon Press was "in no way essential to the deliberations of the Senate," nor did questioning by a federal grand jury "as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence." *Id.* at 625-26 (concluding that the Senator's private arrangements "were not part and parcel of the legislative process"). Furthermore, while a Member's office carries out many "political" functions such as " 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside of Congress," it has "never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause." *Brewster*, 408 U.S. at 512.

Nor does the Speech or Debate Clause confer upon Members or their staff an absolute immunity from civil suits for damages. Perhaps most notably, the Supreme Court held that Senator William Proxmire of Wisconsin could be sued for defamation after he awarded (via press release) a "Golden Fleece of the Month Award" to federal agencies that had sponsored grants for the plaintiff scientist's research. *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). The

Court stated that "nothing in history or in the explicit language of the Clause suggests any intention to create an absolute privilege from liability or suit for defamatory statements made outside the Chamber" of the Senate and explained that "[c]laims under the Clause going beyond what is needed to protect legislative independence are to be *closely scrutinized*." *Id.* at 127 (emphasis supplied).

B. R.L. Vallee Seeks Discovery Regarding Matters Outside the Sphere of "Legitimate Legislative Activity"

R.L. Vallee has accorded due respect to the "freedom of speech, debate, and deliberation," *Gravel*, 408 U.S. at 616, which properly belongs to every Member of Congress and his or her Office. The subpoena to Mr. McLean does not invade or probe his (or the Senator's) conduct within the sphere of "legitimate legislative activity." Consistent with the case law interpreting the Speech or Debate Clause, R.L. Vallee does ***not*** seek to question Mr. McLean about any statements that the Senator may have made on the floor of the United States Senate or at a hearing convened by a Committee of the United States Senate, any statements reflected within an official report published by any Committee of the United States Senate, any subpoenas issued by a Committee of the United States, any resolutions or bills introduced in the United States Senate, or any floor votes the Senator may have cast.[20]

However, the Speech or Debate Clause in no way immunizes Mr. McLean from answering discovery regarding conduct that falls outside of the legislative sphere. It is crystal clear that the Speech or Debate Clause does not immunize a Member for his or her "legitimate 'errands' performed for constituents," such as communicating with Executive agencies about matters of public concern. *Brewster*, 408 U.S. at 512. Far from being commonplace "errands,"

[20] R.L. Vallee is willing to substantially narrow its document requests to avoid any potential infringement upon Speech or Debate matters.

Mr. McLean's repeated communications with private class action counsel were, to put it mildly, highly irregular.

The Speech or Debate Clause therefore does not forbid R.L. Vallee from deposing Mr. McLean regarding, *inter alia*, (1) his (or Senator Sanders') apparent suggestion to AAG Morgan and AAG Kriger that a case be brought against R.L. Vallee "just to make a point;" (2) his testimony before the Vermont Legislature regarding Vermont gasoline prices; (3) any communications or coordination on his (or Senator Sanders') part with officials from the Vermont Attorney General's Office, the Federal Trade Commission, and/or the Department of Justice regarding any investigation into Vermont gasoline prices; (4) any communications or coordination on his (or Senator Sanders') part with members of the Vermont Legislature to introduce or enact state legislation regarding Vermont gasoline prices; and (5) any communications and coordination on his (or Senator Sanders') part with private, for-profit class action lawyers who sought to (and ultimately did) bring the Civil Action.

Unsurprisingly, Mr. McLean identifies no previous instance in which a Member of Congress or a congressional staffer engaged in similar conduct, let alone a case in which such conduct was shielded by the Speech or Debate Clause. Mr. McLean's overbroad assertion of Speech or Debate Clause immunity finds no support in case law and, if accepted, would disturb the "historic balance of the three co-equal branches of Government," *Brewster*, 408 U.S. at 508, by frustrating the judiciary's authority to supervise discovery and decide cases. The judiciary is well equipped to manage and oversee relatively ordinary discovery requests like R.L. Vallee's, and there is nothing inherent in the subpoena to justify the intrusion into separation-of-powers principles invited by Mr. McLean's Motion.

This conclusion is not altered by the unremarkable assertions that Senator Sanders has served on the Senate Committee on Energy and Natural Resources for over eleven years and has "long supported legislation targeting the conditions influencing the high cost of gasoline in Vermont and nationwide." Mot. at 14-15.[21] That Senator Sanders may, occasionally, have engaged in protected speech or debate with respect to gasoline prices in Vermont fails to establish that other non-legislative acts on his (or Mr. McLean's) part are similarly protected. "The key consideration, Supreme Court decisions teach, is the act presented for examination, not the actor." *Walker v. Jones*, 733 F.2d 923, 929 (D.C. Cir. 1984) (Ginsburg, J.). Mr. McLean's conduct was not protected speech or debate within the meaning of Art. I, § 6, cl. 1 of the Constitution and is subject to discovery.

C. Mr. McLean's Conduct Did Not Constitute "Field Work" or "Legislative Fact-Finding"

Mr. McLean's characterization of his extracurricular conduct as falling within Senator Sanders' purported "authority to inquire and legislate" is unavailing. *See* Mot. at 15-19. While R.L. Vallee does not dispute that "[t]he power to investigate and to do so through compulsory process" is "inherent in [Congress'] power to make laws," *Eastland*, 421 U.S. at 504, the protection of the Speech or Debate Clause with respect to congressional investigatory powers is narrower than Mr. McLean suggests. To the extent "field work" by the Senator or his staff may constitute protected legislative activity, *Eastland* requires the Court "not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province." *Id.* at 506 (citing *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951)). Indeed, the case law cited by Mr. McLean articulates a "requirement of congressional authorization of the inquiry by the

[21] The Speech or Debate Clause does not protect Senator Sanders or Mr. McLean by virtue of the Senator's "support" for legislation regarding gasoline prices in Vermont and nationwide, just as it did not protect Senator Proxmire, who served in the U.S. Senate for over thirty years and was dedicated to "publiciz[ing] what he perceived to be the most egregious examples of wasteful government spending." *Proxmire*, 443 U.S. at 114.

particular subcommittee involved." *McSurely v. McClellan*, 553 F.2d 1277, 1287 (D.C. Cir. 1976) (en banc). In *McClellan*, the D.C. Circuit concluded that this requirement was met, *see id.* (citing a Senate Resolution of August 11, 1967 "authoriz[ing] an investigation into the causes of civil and criminal disorder"), but hastened to add, in view of the "'finite limits' to the shield erected by the Speech or Debate Clause," that "a Member of Congress or congressional employee is not free to use every conceivable means to obtain investigatory materials, without fear of criminal prosecution or civil suit." *Id.*

Here, even accepting the dubious premise that his conduct could constitute "field work," Mr. McLean points to no authorization by the Senate or any Committee (or Subcommittee thereof) that he engage in such purportedly investigative conduct. While Senator Sanders did convene and chair a hearing of the Committee on Energy and Natural Resources on August 6, 2012, Mr. McLean does not explain how his imploring the Vermont Attorney General's Office to bring a case "just to make a point," or the coordination with Bailey & Glasser in 2014-15, in any way related to that hearing or were authorized by the Committee.[22] In the absence of such authorization (and an analysis of its scope and applicability to the conduct), this Court should not conclude that such "field work" constituted legitimate legislative activity.

If anything, the Court should reach the opposition conclusion based upon the evidence presented in R.L. Vallee's proffer, *supra*. *Government of Virgin Islands v. Lee*, 775 F.2d 514 (3d Cir. 1985) (cited in Mot. at 16), is instructive. In *Lee*, a Virgin Island legislator (Lee) was prosecuted in connection with his travel to the continental United States. Lee argued that the information should be dismissed because the purpose of his trip was to engage in legislative fact-

[22] Why Mr. McLean—a Vermont-based press aide to the Senator—would be authorized to undertake field work by a Committee or Subcommittee of the Senate is also unclear.

finding.[23] On appeal, the Third Circuit held that "as a general matter, legislative fact-finding is entitled to the protection of legislative immunity, but that . . . immunity does not bar an inquiry into whether a legislator's activities and conversations were, in fact, legislative in nature." *Id.* at 517. The Third Circuit articulated the following analysis in order to determine whether a lawmaker's private conversations constituted "legislative fact-finding:"

> It is undisputed that legislative immunity precludes inquiry into the motives or purposes of a legislative act. . . . However, Lee's private conversations do not, in and of themselves, trigger the legislative privilege because they are not manifestly legislative acts. ***Private conversations—even between officials of governments—do not necessarily involve official business. It is the content of Lee's private conversations, and not the mere fact that the conversations took place, that determines whether Lee is entitled to legislative immunity***. In order for Lee's conversations to trigger the protection of legislative immunity, they must have involved legislative fact-finding. Although Lee maintains that his meetings and conversations were official in nature, and did involve information gathering, ***such assertions cannot preclude a court of competent jurisdiction from determining whether Lee's conversations were, in fact, legislative in nature so as to trigger the immunity***.

Id. at 521 (emphasis supplied). This determination may be based, in part, on an inquiry into the lawmaker's purpose or motive in engaging in the particular acts or conversations under review:

> Senator Lee's purpose or motive . . . will determine in part whether the trip was a legislative act at all. Thus, the government here does not seek to inquire into motives for a legislative act, but rather questions whether certain legislative acts were in fact taken, and whether other non-legislative acts were misrepresented as legislative.

[23] *United States v. Biaggi*, 853 F.2d 89, 103 (2d Cir. 1988), which analyzed this issue in less detail than *Lee*, is consistent with R.L. Vallee's argument. The Second Circuit held that "legislative factfinding activity conducted by Biaggi during his Florida trips was protected" but was "unpersuaded" that "the travel itself should be considered legislative activity." *Id.* at 103-04.

Id. at 524.[24] *Lee* thus teaches that this Court need not accept Mr. McLean's assertion at face value that his conduct, at all times, constituted protected "field work" or "legislative fact-finding."

For the foregoing reasons, the Speech or Debate Clause does not support the quashal of the subpoena to Mr. McLean. The Speech or Debate Clause protects legislative independence, but does not make the Legislative Branch superior to the Executive and Judicial Branches. As then-Judge Ginsburg stated, "[i]t would demean the high purpose of the Speech or Debate privilege to extend it to official activities of Congress members and their aides in 'mundane field' outside 'the legislative core.'" *Walker*, 733 F.2d at 929. Because R.L. Vallee's subpoena does not intrude upon the sphere of legitimate legislative activity, Mr. McLean's assertion of Speech or Debate Clause immunity should fail.

III. THE SUBPOENA TO MR. McLEAN IS NOT UNDULY BURDENSOME

Mr. McLean finally asserts that the subpoena should be quashed because it is unduly burdensome under Fed. R. Civ. P. 45. Mot. at 20-23. This argument should likewise be rejected. The subpoena and its subject matter should come as no surprise to Mr. McLean. Defendants have sought to take Mr. McLean's deposition for months and, to that end, engaged in negotiations with the Office of the Senate Legal Counsel in order to secure Mr. McLean's appearance. In the weeks prior to the service of the subpoena, undersigned counsel communicated with Attorney Vinik and explained, in no uncertain terms, the relevance of Mr. McLean's knowledge and conduct to R.L. Vallee's defense in the Civil Action.

[24] The Third Circuit further instructed the district court on remand that "[s]ince Senator Lee is asserting a legislative privilege, the burden of establishing the applicability of legislative immunity, by a preponderance of the evidence, rests with him." *Gov't of Virgin Islands v. Lee*, 775 F.2d 514, 524 (3d Cir. 1985).

Far from being a "fishing expedition" (Mot. at 18-19), R.L. Vallee has demonstrated a sufficient need to discover the extent and motivation of Mr. McLean's (and the Senator's) repeated apparent efforts to bring price-fixing and other antitrust enforcement actions against R.L. Vallee over a period of years. The Civil Action may well have been brought forward based upon political considerations, rather than actual evidence of an anti-competitive conspiracy. This would clearly tend to exculpate R.L. Vallee. While this animus and bias against R.L. Vallee is no secret, their extent can only be ascertained through discovery.[25] Indeed, it is only through the discovery process that R.L. Vallee learned that Mr. McLean and/or Senator Sanders had raised the issue of the Attorney General's Office bringing an enforcement action "just to make a point." Given the persistent lengths Senator Sanders has gone to get the FTC in 2009, the FTC in 2012, the Vermont Attorney General's Office in 2014, and the private firm of Bailey & Glasser in 2015 to bring suit against R.L. Vallee, it is hardly unduly burdensome to Mr. McLean to make himself reasonably available and give an accounting of his personal communications and conduct relating to this dispute.[26]

Nor can it seriously be contended that Mr. McLean's sitting for a deposition in the same city in which he works would create a distraction or diversion from his day-to-day duties. Mr. McLean will have to travel only three short blocks to attend his deposition at the undersigned's office in Burlington. The Senate often finds itself out of legislative session. He is represented, at public expense, by highly experienced and capable counsel from the Office of the United States Senate Legal Counsel.[27] It is, *at most*, a minor imposition upon Mr. McLean's schedule that he

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[25] The Freedom of Information Act, 5 U.S.C. § 552, does not apply to Members of Congress or their Offices.

[26] As indicated above, R.L. Vallee is prepared to narrow its document requests of Mr. McLean and discussions about such narrowed requests are ongoing.

[27] *See* ECF Nos. 2-4 (Notices of Appearance by Patricia Mack Bryan, Esq., Morgan J. Frankel, Esq., and Grant R. Vinik, Esq.).

be required to sit for a third-party deposition in connection with a multi-million-dollar antitrust litigation that he appears to have helped to precipitate. Given that Mr. McLean's months-long communications and coordination with a private, class-action law firm based in Washington, D.C. to bring a private litigation against Vermont companies apparently did not distract him from his legislative tasks, he can hardly be heard to complain that a several-hour-long deposition about that very conduct would constitute an impermissible distraction.

CONCLUSION

For the foregoing reasons, R.L. Vallee respectfully requests that Mr. McLean's Motion to Quash (ECF 7) be DENIED.

Dated at Burlington, Vermont, this 13th day of December, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on Thursday, the 13th day of December, 2018, I filed the foregoing Memorandum in Opposition to Daniel McLean's Motion to Quash with the clerk of the court via ECF and that a true and accurate copy will be served on counsel via the Court's ECF system.

/s/ Tristram J. Coffin
Tristram J. Coffin